UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CHAVEY ELECTRICAL CONTRACTING, INC.

and Case 28–CA–18553

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 412, AFL–CIO

Liza Walker-McBride, Albuquerque, New Mexico, for the General Counsel.
Anne Marie Turner, of the *Law Office of Nicholas J. Noeding*, Albuquerque, New Mexico, for Respondent.
John L. Hollis, Albuquerque, New Mexico, for the Charging Party.

DECISION

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Farmington, New Mexico on July 15-17, 2003, based upon a complaint issued April 30, 2003 [1] by the Regional Director for Region 28. The underlying unfair labor practice charge was filed by the International Brotherhood of Electrical Workers, Local Union No. 412**,** AFL-CIO, on March 5, subsequently amended on April 28. The complaint alleges that Chavey Electrical Contracting, Inc., (herein called Respondent) violated §8(a)(1) and (3) by threatening employees with a reprisal, that if they did not inform a New Mexico State Department of Labor investigator they were classified as laborers, they would be reported to Respondent's owner; and that two employees were discharged because of their union activities or because of their protected concerted activities in filing prevailing wage claims with the state department of labor. Respondent denies the commission of any unfair labor practice and asserts that the employees were laid off because of financial necessity, arguing that the elements of knowledge and animus are missing. It also asserts the decision to lay them off occurred before it learned the employees had simultaneously filed any wage claims.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel, the Charging Party and Respondent have all filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

[1] All dates are 2003 unless otherwise stated.

Findings of Fact

I. Jurisdiction

According to the pleadings, Respondent is a New Mexico corporation with an office in place of business in Bloomfield, New Mexico, where it is an electrical contractor in the building and construction industry. It admits that during the 12-month period ending March 5, 2003, in the course and conduct of its business it has purchased and received goods originating outside New Mexico valued in excess of $50,000. Accordingly, it admits that it is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. It further admits that the Union is a labor organization within the meaning of §2(5) of the Act.

II. The Alleged Unfair Labor Practices

Respondent is a small non-union contractor. It is entirely owned by its president, Dana Chavey and his wife Debra, the corporate secretary-treasurer. Debra operates her own business, a rental business of some type, and is not involved in the day-to-day operation of the electrical contracting company. However, in her capacity as secretary-treasurer, she does perform the bookkeeping and payroll functions of that business. Both Dana and Debra are well aware of Respondent's financial position at any given time. Respondent's largest project during 2002-2003 was serving as the electrical subcontractor for general contractor Jaynes Corporation, on Jaynes' City of Farmington's new public library project (the Library).

Respondent, like many small contractors, has a constant cash flow regulation problem arising from a number of sources, including the smooth flow of construction projects from one to the next. Whenever an excessive amount of time passes between projects, it becomes difficult to maintain staffing levels. Sometimes cash flow suffers and such employers become obligated to choose between negative cash flow/debt and keeping the staff employed. Contractors usually choose to lay off employees in that circumstance because they simply don't have the money to pay them. This case presents a question of causality. Respondent asserts that the sole reason for the layoffs alleged to be unfair labor practices is an inability to pay employees due to a cash flow hiatus stemming from an inability to successfully bid on projects as the Library neared completion.

Respondent chose to run the Library with a foreman (licensed as a journeyman), a licensed journeyman and three to four helpers. Julian Martinez was the foreman, though he thought of himself as only a leadman; Ray Armenta was the licensed journeyman; and the helpers included the two dischargees, Thomas Hensley and Wallace Hunter. Other helpers were Loren Pioche, Armon Martinez (Julian's brother), Ernest Alcone and Nick Todacheenie. There was some turnover among them and it would appear the number of non-journeymen on the site never exceeded four at any given time. Alcone and Todacheenie left during the fall of 2002. Hensley and Hunter replaced them. [2]

Specifically, Alcone left Respondent's employ in October 2002, shortly thereafter filing a wage claim. The record is not clear regarding the theory of his claim, but it probably dealt with an assertion that Respondent was not paying the prevailing wage. When Alcone did not support his claim under the New Mexico Department of Labor (NMDOL) rules, his claim was dismissed.

Nonetheless, Alcone's claim may have been the trigger for an NMDOL investigation in January. Even so, there is evidence, from Pioche, that something involving the NMDOL

[2] In December, Respondent hired another licensed journeyman, Robert Delese, who seems to have been assigned projects other than the Library, including work at the San Juan Regional Medical Center Cardiac Cath Lab and two private residences.

occurred as much as 4 months earlier. Under his version the earlier event may actually have been tracking the Alcone claim, but the evidence is indistinct. There is also Julian Martinez's testimony that he learned a state inspector had come to the site without speaking to him, instead speaking to Alcone and Armon Martinez. He doesn't remember when that occurred, but if Alcone was on the site, the visit was before Alcone left in October. Julian was ignorant of the access rights of the inspector and a bit prickly. He asked an official from Jaynes whether the inspector could come on the property as he had and talk to employees. The Jaynes official told Julian that the state had every right to do so.

According to Pioche, sometime in September or October, Julian Martinez came to the Library multipurpose room where he and Todacheenie were working. Pioche testified:

> . . . We were running conduit, and Mr. Martinez came to us. He told us: Let's look at the print first. And so, he wanted to show us the print. So, we came down from -- we were up in the ceiling on a lift. We came down, and he said: Hey. This is what I want you guys to do when you finish this. And then he says: Well, first of all, *there's a guy from Santa Fe coming. He's going to ask you what your job title was*. So, we said okay. He said: 'You tell him you're a laborer.'
> Q. (By Ms. McBRIDE) Did you ask him -- did that seem surprising to you?
> A. Yeah, it seemed surprising. We just said okay.
> Q. You didn't question him about that?
> A. No, we didn't question him about it.
> Q. Before he -- before that conversation with Mr. Martinez, had anyone from Chavey told you that you were a laborer?
> A. No.
> Q. Did you in fact meet with an investigator in September or October?
> A. Yeah.
> Q. And did he ask you what your classification was?
> A. Yes, ma'am.
> Q. And what did you tell him?
> A. We just told him we were labor[ers] at the time.
> Q. Even though you didn't think you were?
> A. Yeah, even though we didn't think we were.
> * * *
> (By Ms. McBRIDE) Did you -- you said that was the first occasion. When was the second occasion?
> A. It was in December. (Italics supplied.)

Pioche is in error regarding the date of the second visit. NMDOL investigator Stephen C. Drake [3] said his first visit to the site was on January 9. Nonetheless, Pioche's testimony is a bit curious. How would Julian Martinez know, in September or October 2002 that a NMDOL investigator would be coming to the site? Drake testified that site inspections are never scheduled in advance. Moreover, how would Martinez know the investigator would ask them

[3] Drake's official title is "labor law administrator." He is a recent appointee, assuming his duties in October 2002. His principal background consists of 22 years' experience as a journeyman ironworker and as a health and safety instructor in the construction industry. One of only eight labor law administrators in the state, he has broad statutory powers permitting him access to private and public property. In describing those powers he said, with reference to the hotel where this hearing was being conducted: "[Under my statute] I could go through complete inspection rights on this whole building, and if they refused it to me, I could have the refusing person arrested at the time and charged with a misdemeanor."

about their job classification? And, why would he need to specially tell them to advise the investigator they were laborers? Indeed, Martinez says he always regarded them as laborers; according to him, shortly after their hire, both he and Dana Chavey had told them they were skilled laborers. The men even joked about it at times. [4] A special instruction to the staff in the fall of 2002 seems unlikely, since they were all well aware of it.

Hunter also testified regarding what he was told his classification was. He testified that he was hired in May 2002. He seems to have been in error here as both he and Hensley were hired as replacements for others who had left in the fall. In response to a question from the Charging Party, Hunter testified that at the time he was hired, Dana Chavey told him he would be classified as an electrical helper. Chavey disagrees, saying Hunter, like all non-journeymen, had been told he was a skilled laborer. The General Counsel adduced evidence from Hunter that he had only one conversation with Julian Martinez about that issue. Hunter says at some point, though he had no way of dating the conversation, Martinez came up to him to discuss what he should tell the inspector, if he asked. He testified:

Q. (By Ms. McBRIDE) What did Julian Martinez say to you in that conversation?
A. He told me when the inspector comes to the job site, he told me to say you're a laborer.
Q. Did he tell you what if anything would happen if you did not say you were a laborer?
A. He said if I don't say laborer, he's going to tell the owner, Dana Chavey.

On cross-examination, his testimony was more benign.

Q. (By Ms. TURNER) Okay. Isn't it true that he told you that if you didn't agree with your classification, to talk to Dana Chavey?
A. Yes.

Frankly, I find Hunter's testimony about this single conversation to be inconsistent at best. He first suggests a conversation which might be regarded as evidence of an implied threat to coerce him into making a false statement to the NMDOL. Then he quickly recants it, putting it more in accordance with Martinez's (and Pioche's) testimony above. Martinez, of course, says all the so-called helpers knew they were laborers and they even joked about it. Since Martinez believed Chavey knew the proper classifications, and he did not, Hunter's second answer seems the most plausible: If you have a question about your classification, see Mr. Chavey. That statement is obviously non-coercive.

On balance, I do not think Hunter's first version, adduced by the General Counsel, can be credited. Not only is it inconsistent with his second account, the second seems to fit more plausibly with other, non-threatening evidence and jokes supplied by his fellows, Pioche and Hensley. Furthermore, my assessment of Hunter is that he believes both his first and second versions are the same. He cannot distinguish them. Accordingly, I find he doesn't have any specific recollection that can be relied upon.

On January 9, Drake made an unannounced visit to the Farmington Library site. He visited with nearly every person he could find on the site, whether employed by Jaynes, Respondent, or any other subcontractor. He testified that he had difficulty with Martinez, describing him as hostile and evasive. Martinez explained that he had been visiting a vendor's supply house and was not on the site when the inspector arrived. He had other things on his

[4] Martinez testified that every day one of his duties was to go to the Jaynes trailer and report the classification of each Chavey employee at work that day. He said the crew made jokes about it. As an example, when he assigned work to Pioche, he recalled Pioche often said something like, " 'Well, I can't do that, I'm just a skilled laborer,' you know, just joking." Pioche agrees he joked about it: "Well, give me a shovel if I'm a laborer."

mind and did not want to be interrupted. Among them, he had just parked in a location which Jaynes wanted to use and he was being forced to move his truck at the same time Drake was trying to talk to him. He told Drake several times to 'hold on' while he accomplished that task and some others he deemed more pressing. Martinez asserts that Drake became offended and interpreted his behavior as evasive.

Drake admits to becoming annoyed and that they had an unfriendly exchange regarding whether Martinez's cowboy-style hard hat was an approved safety device. Martinez could not understand why Drake was so impatient. ("It was like God walked right up and I didn't give him any attention, you know, and I tried to tell him from the very start, 'just hold on a minute here', and . . . He just slammed his book all mad and headed out, and that was about it.") At some point, they did speak at length and Martinez says he answered all of Drake's questions. Apparently the whole "delay" took less than 10 minutes.

Drake, miffed, testified that Martinez threatened to lay off employees when he told him his job was to guarantee that employees received the prevailing wage. Drake's testimony describing his contact with Martinez that day was somewhat of a narrative; moreover, he was eager to describe Martinez's perceived disrespect:

Q. (By Ms. McBRIDE) Okay. Did you have occasion to talk to a Julian Martinez?
A. (Witness Drake) Yes.
Q. And can you tell us how that came about?
A. He was the foreman of the job at the time, I believe. He was wearing a cowboy hat. I spoke to a journeyman electrician and a laborer that were working together. I had gone to the next light pole and spoke to a laborer and a laborer that were working together who [I] thought that they might be apprentices, but they could not tell me what apprentice program they were in. Then I spoke to two other laborers who at that time told me that they were told to say that they were laborers and not apprentice electricians.
Q. Did they tell you who had told them to say that?
A. No --
Q. Okay.
A. -- Mr. Martinez, I started towards him, he jumped in his truck and drove to the other side of the location. I believe that this happened four times. Finally, the last time that I spoke to him was towards the end of the inspection. He was speaking on the phone.
Q. Where was he?
A. Trying to get into his pickup truck to leave again. And I more or less stopped him and said that I needed to speak to him. He had a very belligerent tone with me. I do not think that I flashed my badge at the time, but I identified myself as working for the Department of Labor and told him that I guaranteed that the prevailing wages would be paid. *When I said that to him, he said: 'We'll just lay them all off; we're not going to pay them.'* And I said: 'You can't do that.' He said something about calling Mr. Chavey if I wanted to speak to him. At that time I did not have enough evidence to speak to anybody, so I said no. We had other conversation about his wearing of the straw hard hat that he had on. (Italics supplied.)

As a result of this encounter Drake went to Jaynes Corporation and asked for certified payrolls for the Library project. Drake was unable to provide them right away; Jaynes submitted them in February, some 3 weeks later. In the meantime, Drake decided to pursue his investigation. One of his objects was to determine if the employees were being paid according to their duties as set forth in a so-called 'wage decision' which the NMDOL had issued for that job. His principal difficulty was determining what duties the individuals who had described themselves as 'laborers' actually performed. He called a long-time acquaintance, the Charging Party Union's assistant business agent, Benson Bitsui, and asked him to take pictures of the electricians at the Library jobsite. Bitsui did so. Later in January, Drake returned to the site and took additional photos. All are of Respondent's employees as they performed their work.

These demonstrated to Drake that the work being performed was not laborers work, but electrical work. He concluded there was a violation of the state prevailing wage law because, among other things, the wage decision did not provide for laborers to perform electrical work. He concluded they were, instead, electrical helpers, a job which was not included in the wage decision at all. From his perspective, once he had acquired the payroll records, he believed there was sufficient proof that these individuals were entitled to be paid as journeymen electricians, since the wage decision provided for no other electrician wage. Drake reached his conclusion at least 3 weeks, if not more, after the threat he described Martinez making.

The threat seems somewhat implausible, given the surrounding circumstances. According to Drake, he was having difficulty getting Martinez to pay attention to him. When Drake finally cornered Martinez, one of the things Drake told him was that it was Drake's job to guarantee that employees were paid the prevailing wage. He says Martinez responded that if the Company had to do that, it would lay the employees off. The implausibility comes from the fact that Martinez did none of the hiring and firing (though a few weeks later, he found himself in the middle of the discharge of his younger brother, Armon, who had lost his temper). Dana Chavey handled all personnel decisions, even the one involving Armon. Moreover, Dana set the wage for each hire and made the decisions to grant increases. Julian Martinez had no input at all regarding either the hiring or the initial wage rates to be paid. Even though he knew he was called a foreman, Martinez thought of himself only as a lead, given Dana Chavey's proximity. He had worked for Respondent, on and off, for about 6 years. Furthermore, although a licensed journeyman electrician, he had very little, if any, experience regarding minimum wage matters. The record does not reflect when he obtained his state license, but his union status as a journeyman was quite limited. He had become a journeyman IBEW member about 18 months before the Library began when he had held a 6-month job for a power company. Union membership was required there. [5] When a layoff occurred, he again hooked up with Respondent. Because he could not find employment through the Union in the Four Corners area, he asked for and obtained permission to work non-union.

Furthermore, Martinez was quite ignorant of prevailing wage laws, much less the nature of any 'wage decision' made by the NMDOL and had no responsibility for such matters. He may know the electrical trade, but he is a rural electrician without much exposure to wage laws. He did not understand what Drake's duties actually were, nor did he know the extent of Drake's authority. He had to ask someone at Jaynes. He can fairly be described as ignorant on questions outside the scope of his electrical skills.

Given Martinez's limited firing experience, his non-existent wage authority, his lack of knowledge about prevailing wage laws, and his belief that the helpers were properly considered to be skilled laborers (per Dana Chavey's assessment), his response to Drake would not have been a threat to lay anyone off. Instead, Martinez would have directed Drake to see Dana Chavey about such matters (though perhaps with a bristling manner). Indeed, Drake concedes Martinez made that very suggestion. (*"He said something about calling Mr. Chavey if I wanted to speak to him."*) Drake declined the suggestion, saying he didn't have enough information to talk to anyone at that point. (If he did not, wouldn't Dana Chavey have been the best and most handy source to provide the information he needed?)

[5] The record does not disclose whether the power company job was in construction or maintenance.

From Drake's perspective, since Martinez wasn't being helpful, why would he not speak to Chavey, the person who best knew the wage facts? Drake was then in Farmington, only 13 miles from Respondent's Bloomfield office/residence;[6] why not address the matter right then, rather than putting it off and making a second 400-mile round trip from Santa Fe later? A simple phone call would have determined whether and how soon Chavey would speak to him. Why not accept Martinez's invitation to call Chavey?

Moreover, can it be said that Drake is free of partisanship here? A state official should normally not concern himself with anything other than the enforcement of the laws for which he has responsibility. Yet, here, Drake gave investigative information about Respondent to a non-governmental person, Benson Bitsui, the Charging Party's assistant business agent, who used it for the purpose of organizing. Undoubtedly, Drake knew Bitsui would do so. Drake's behavior suggests not only a lack of professionalism, but a bias in favor of unionization. Neutrality does not seem to be his concern.

I find Drake's approach to this situation to be quite irregular. Drake's behavior, together with objective facts and Martinez's plausible testimony, warrants discrediting him regarding the threat he says Martinez made. A threat simply isn't very likely. Not only is the timing somewhat anomalous, occurring well before any wage claims were filed, Martinez had no particular reason, or even sufficient knowledge, to make a threat regarding prevailing wages. Drake was Chavey's problem, not Martinez's. Instead, Martinez's expected response would be to suggest Drake call Chavey and speak directly to him. And, Drake said, Martinez did exactly that.

Drake, moreover, was offended by Martinez's perceived disrespect. Indeed, the tone of Drake's testimony was aimed at demonstrating that Martinez was contemptuous of his authority. Drake felt slighted and for that reason colored his testimony, resorting to a scarcely controlled narrative to accomplish his purpose. Furthermore, Drake's demonstrated preference for union organizing suggests his testimony, aside from its own contextual shortcomings, appears designed to advance improperly the Union's interests. I cannot accept it. Accordingly, Drake's testimony regarding Martinez's supposed threat is discredited. [7]

As noted, Drake contacted the Charging Party's assistant business agent Benson Bitsui to seek his assistance. Bitsui used the opportunity to contact Loren Pioche. He convinced Pioche to speak to the other helpers about the benefits of unionization and also offered to help with any wage claims they might appropriately make. Pioche did so, and he and the other three helpers (Thomas Hensley, Wallace Hunter and Armon Martinez) discussed Bitsui's proposal at work. In quick order they met three times with Bitsui at the Union's office. There they signed authorization cards and on February 12 all four filled out wage claim forms with Bitsui's assistance. When they left the union office, the forms needed to be notarized and mailed to the NMDOL in Santa Fe. Hensley, Hunter and Armon Martinez obtained notarizations. Pioche chose not to file a claim. It is not clear whether Bitsui did the mailings or whether the individuals did. There is testimony both ways.

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[6] Dana Chavey was usually in his truck during the day, but available by cell phone. Had Drake called him, he may have been only minutes away. Furthermore, Bloomfield is on Drake's direct return route to Santa Fe. Stopping there, if necessary, would not have been out of the way.

[7] Even if Drake's testimony about the threat were credited, it is not clear that it would, in the final analysis, be evidence of much, for Martinez was ignorant of wage matters and may be perceived as not privy to Respondent's policy. Furthermore, Respondent's cash-flow defense would rebut it. See discussion, infra.

On February 18, Bitsui sent Respondent a letter in which he advised that the four had joined the Union's so-called 'Voluntary Organizing Committee.' He specifically listed all four names, Pioche, Hunter, Hensley and Armon Martinez. Respondent received it on February 20.

It was about this time that Armon misbehaved on the job and Julian told him to take his tools and leave. A similar incident had occurred earlier on another project where eventually all was forgiven, and Chavey had permitted him to return. This time, however, Armon never contacted either Chavey or Julian. He has not come back.

When the wage claims arrived at the NMDOL, they were assigned to Drake for processing. On February 26, he both mailed and faxed cover letters to Respondent, together with a copy of each claim. He called Respondent's office in Bloomfield to obtain the fax number and spoke for a short while to Debra Chavey. Later, on March 5 (at 8:02 a.m. [8]), all three claims arrived via USPS at Respondent's office in the same NMDOL envelope.

Drake describes the conversation after Mrs. Chavey gave him the fax number:

Q. (By Ms. McBRIDE) . . . With whom did you speak?
A. Mrs. Chavey.
Q. Okay. And what did you tell her?
A. I more or less explained that the wage claims had been filed and that the process had been started and that she would be receiving a letter, and if she did not receive the letter to let me know, and that she had 14 days to respond to this letter.
Q. Did you identify the claimants?
A. Yes.
Q. What if anything did she say to you?
A. The way I remember the conversation was Mrs. Chavey was very, very polite to me, which I did not expect. Usually when you call somebody up and tell them --
THE COURT: Just she was polite and she said what?
THE WITNESS: Basically that they would be responding to the claim.
Q. (By Ms. McBRIDE) Did she discuss any of the claimants with you?
A. Yes. One of them was laid off due to a brother's refusal to obey orders, or something like that. She went into detail about the two brothers had gotten into a fight on the job and they had to let one of them go.
Q. Did she discuss the other two claimants?
A. No, ma'am.
Q. Do you recall which of the claimants she identified as having been let go?
A. I believe it was one of the Martinezes.

Drake does not assert that she said anything more.

Debra Chavey's version is similar, except she adds that she told Drake the Company would gladly get him the records he needed to process the claims. At the time of the instant hearing the wage claims were being processed by the NMDOL and were awaiting a hearing before that agency.

On March 5, before the workday began, Respondent laid off both Hensley and Hunter. For that day, Hensley had been assigned to a short residential project while Hunter remained at the Library. Hunter says Martinez told him of his layoff while he sat in his car about 7 or 7:30 that morning before work; he said the layoff was per Chavey's instructions. Hunter testified Martinez told him: "Wallace, you got -- today's your last day and here's your paycheck and your

[8] Jt.Exh. 5

layoff papers. You know I don't want to let you go, but -- I don't want to let you go. Then he said: 'I don't want you to go, but there's a lot of work that still remains, but Dana told me to let you go, so I'm letting you go.'"

Pioche had been sitting in his own car waiting for the workday to begin. He observed the conversation between Martinez and Hunter at Hunter's vehicle but only learned its substance when Hunter declined to join him in walking into the building. A short time later, Pioche asked Martinez why Hunter had been laid off. He recalls Martinez's explanation: "He said: 'Well, I don't know, I mean, if it was up to me I would keep him a little longer, but I guess Dana does all the figuring and he figured we didn't need any help. And a journeyman from another job was going to come and help us finish the job [probably Robert Delese], but there was -- nobody ever came.'"

Chavey himself was already waiting at the house for Hensley's arrival to inform him he was being laid off. Hensley said he had worked on that project (the Evans house) for about a day and a half and "It was pretty much finished." He also said that there was a second house next door to which Chavey had, the night before, assigned him to begin rough-in work. Hensley said Chavey told him he was being laid off because "there wasn't enough work to keep us -- keep me busy."

Pioche was retained and worked until, he thinks, May 24. By that time, Armenta had left to take another job. Technically, the Library was done. Only he and Martinez were left and were doing some add-on work, lighting on the library stacks and the fountain. In fact, Dana Chavey had joined them, working with his tools on some of those matters.

Counsel for the General Counsel offered a great deal of testimony to demonstrate that the reason given for the layoffs, lack of work, was not true (though Hunter was not offered that reason); that there was a great deal of work; Hensley still had the second house; the Library was behind schedule and Jaynes was pushing Respondent to pick up its pace, and that journeyman Ray Armenta had been sick and unable to come to work during that week. There is even some anecdotal evidence that the drywallers had covered the metal studwork with sheetrock, requiring its removal so electrical conduit could be inserted; in the normal course, that wiring would have been installed before the wallboard covered it. She also observes that Respondent at the hearing offered a different reason for the layoffs, lack of cash flow.

The facts are that in January and February Respondent was unable to secure additional bids. Dana Chavey knew that Jaynes would not meet the targeted finish date for the Library, sometime in March. Even so, at that time much of the Library contract money had been paid [9] and there was some likelihood that the remaining money would be held back, not by the NMDOL, which hadn't yet acted, but by both Jaynes and the City of Farmington. Jaynes had been apprised of a payment discrepancy claimed by an electrical supplier. It had been issuing two-party checks made out to both Chavey and the supplier, who was claiming a $20,000 underpayment. To resolve that problem, Jaynes put a hold on all payments to Chavey. (The merits of that dispute are not before me, but Dana Chavey explained it revolved around the fact that the supplier had closed its Farmington office and the billings had been turned over to its Albuquerque headquarters which did not yet have the correct figures. He regarded it as a probable math error). The City was likely to hold back a retainage amount. [10]

[9] At the end of January, the value of the remaining work was only $56,448 of a total of $919,209. (CP Exh. 3)

[10] Retainage often occurs toward the end of projects to guarantee that the project is completed. It is both a carrot and a stick wielded by the project owner. Here the Library held the retainage and, by the time of the hearing, in mid-July, the NMDOL had frozen it.

More importantly to Chavey was his difficulty in obtaining or generating immediate work. The box below shows the dates Respondent made bids and the nature of the projects in 2003 up to the date of the hearing. The unshaded proposals occurred during the time frame shortly before Respondent's decision to lay off Hensley and Hunter.

Date	Name of Project (General Contr.)	Value	Result of Bid
January 23	McCoy Elementary Sch. Renov. (B&M Cilleson Constr.)	$241,000	Lost
January 31	Holiday Inn Express (Uselman Constr.)	$78,210	Lost
February 18	Isleta (NM) Head Start Child Care (south of Albuquerque)	$493,500	Lost
February 25	Lydia Rippey Elementary Sch. (Jaynes)	$197,500	Lost
February 28	San Juan College Child & Family Dev. Center (self)	$28,000	Lost
March 20	San Juan Reg. Med Ctr. Critical Care Unit (Broten, Inc.)	$182,000	Won
April 2	Ladera Village Apartments (Gentry Constr.)	$247,000	Lost
April 10	Zone 6E Water Tank (Consolidated Constructors)	$8,500	Lost
April 17	Animas Credit Union (Jaynes)	$125,000	Lost
April 24	Jicarilla Dormitory (Jaynes)(Dulce, NM)	$396,500	Won (delayed)
May 20	Farmington H.S. Fine Arts & P.E. Building (Western Industrial)	$88,000	Won
May 28	Animas Valley Mall Food Court (Camco Pacific)	$72,500	Lost
June 13	San Juan Reg. Med Ctr. Childrens Discovery Place (Oakland Constr.)	$175,000	Owner reconsidering project
June 26	City of Bloomfield Admin. Bldg. Addition and Renov. (A.I.C.)	$285,000	Lost

All these projects are/were relatively local to Bloomfield (Farmington, Aztec) except for the Isleta Head Start (about 180 miles away) and the Jicarilla Dormitory (about 75 miles east). Respondent had no work at all between the end of the Library in May and the beginning of July when it started on the relatively small Farmington High School project (having won the bid on May 20).

According to Dana Chavey, in early February it became clear that he needed to obtain additional work or else he would be facing the need to lay off employees. At that time he thought he would need to lay off two of the helpers/laborers. After discussing the situation with Julian Martinez, he decided, if it came to it, that he would lay off Hunter and Hensley. Almost simultaneously, he advised Debra of the probable need for layoffs. The best of the laborer/helpers was Pioche. Armon Martinez was held in higher regard than the other two (plus he was Julian's brother), so Dana initially planned to keep him. Yet, on February 17, Armon refused to take instructions from Julian and engaged in a profane display of anger. Julian told him to pick up his tools and leave the job. Armon did so, and, as noted, never sought to return. He was considered a termination as of February 20.

The financial picture, in the meantime, continued to deteriorate. The February 18 Isleta bid fell through, followed by the loss of the Lydia Rippey School a week later. On February 28, the San Juan College job fell as well. Well before that, Chavey had come to doubt Respondent's ability to make payroll. Because of the stoppage of the progress payment by Jaynes due to the materialman billing dispute and the expected retainage by the City, Respondent on February 24 had obtained a $25,000 short term loan from its bank. In addition, during March, Debra's other business lent Respondent $2000 and Dana obtained an additional $4000 from a credit card advance.

In the February 2 bank statement, Respondent's business account had shown a balance of only $22,838 based on debits of $39,283 against credits of only $36,330. A month later, the March 2 statement showed debits of $31,126 and two credits, one the $25,000 loan and the other the $6000 advance (the actual entry was $6528). Had those loans not been taken, the statement would have shown a balance of ($1760), a negative balance. These loans allowed Respondent to meet expenses for a short while. In essence, Respondent had borrowed $31,000 in late February to cover March expenses. Beyond that, Dana testified without contradiction that he forewent his March paychecks.

There is no question but that in early March Respondent was out of money and without immediate income prospects. It still had some work to perform on the Library, but the cash flow situation meant that it would have to perform work without the prospect of immediate reimbursement. Dana knew he would have to perform the remaining work on his own. The bank loan helped, but was only delaying things. He had no idea when he would get the retainage and in the meantime, his last progress payment from Jaynes was being held up.

In the face of this financial circumstance, Dana laid off Hunter and Hensley on March 6, finalizing his decision to do so the night before. That evening, he and Debra even discussed how the matter might look, given the recently received wage claim notices. (In fact, the mailed copies had arrived on the same day of the discussion; the faxed versions had preceded the mailed ones several days before.) Debra testified Dana told her it couldn't be helped, ". . . financially we did not have another choice." As a result, he chose to lay off the two discriminatees and limp through the remaining work. In early March, Respondent had only the Library, then in its final stages, a small amount of work left at the Cath Lab and an even smaller amount of residential work. With the loans he could pay journeyman Robert Delese for his work on the Cath Lab and for the residences from which Hensley was being removed, as well as short-handedly struggle with finishing the Library. (Later, on March 13, he persuaded Jaynes to grant a partial progress payment.)

III. Analysis and Conclusions

I have already rejected, on credibility grounds, the contention that Julian Martinez made a statement to NMDOL investigator Stephen Drake which would qualify as evidence that Respondent would punish employees who made a wage claim relating to the prevailing wage. Likewise, I could not credit Hunter's testimony, as alleged in the complaint, that Martinez threatened to tell on him if he told the NMDOL investigator that he was an electrical helper, not a laborer.

This leaves the evidence in a curious state. There is no credible evidence that Respondent harbored any animus against its employees when they filed wage claims with the NMDOL. Nor is there any evidence whatsoever that Respondent has animus against the Union. Indeed, the General Counsel offered no evidence on that point whatsoever. One could also forcefully argue that there is little, if any, evidence that Respondent knew the employees' activity in filing wage claims qualified as concerted. Certainly it had no knowledge that the three employees had met together and discussed filing the claims. It might guess, from the fact that all three claims arrived in the same envelope, that the employees were acting in concert. Still, I

think it is reasonable to conclude that their action here qualified as concerted and was designed for their mutual aid and protection. I shall assume, for this discussion that Respondent was aware of the protected nature of the claims.

It is certainly accurate to observe that Hensley and Hunter were discharged during a time frame that suggests that one or both of those motives may have been in play. Still, there is no direct proof. Of course, direct proof is often unavailable in cases such as this. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Even so, the element of animus can be inferred from the surrounding circumstances, particularly if those circumstances make the unlawful motive more plausible than not. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). Not withstanding that, if animus can reasonably be inferred, thereby making out a prima facie case, a Respondent may still rebut it by demonstrating that it would have taken the same action it did, absent any unlawful motive. See generally, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Here, I have serious reservations about the General Counsel's case. In large part it relies on witnesses who, for different reasons, cannot be regarded as credible. That void suggests that there are no other surrounding circumstances which can allow for an anti §7 inference, whether aimed at employee rights under principles of concerted activity or under the right to engage in union organizing. Indeed, it suggests witnesses are creating evidence, not simply describing it. Moreover, the General Counsel has not shown that Respondent has presented any pretextuous reasons for the layoffs.

Even so, the timing of the discharges suggests a connection between the activity and the discharge and there is no question but that Dana and Debra Chavey both knew about the employees' union activity and their wage claims. Yet there is countervailing evidence that this knowledge had no effect whatsoever on the Chaveys, either as an Employer or as individuals. Martinez himself was a member of the Charging Party Union, yet Chavey had given him a position of responsibility, that of foreman. Second, Respondent had no concerns about wage claims by individuals. One had been filed in late 2002 by employee Ernest Alcone which had ended without action. Respondent's experience with such claims suggests that it believed it had nothing to fear from the discriminatees' similar claims occurring a few months later. In fact, NMDOL investigator Drake remarked on how accommodating Debra Chavey had been over the claims. The presence of animus has not been proven.

The reservations one must have about the General Counsel's case are significant and lead me to the conclusion that the elements of a violation are not present. The complaint, on that basis alone, should be dismissed. The nexus between the protected conduct and the layoffs has not been established by a preponderance of the evidence.

Even so, if one assumes that a prima facie case has been made out, I find it to have been rebutted by Respondent's evidence of its inability to continue to meet payroll. Both the General Counsel and Respondent argue that Respondent has given inconsistent reasons for the layoffs. It observes that Respondent's initial explanation for the layoffs was a lack of

work. [11] Indeed, Dana Chavey said as much in his investigative affidavit. Yet, when Respondent presented its case, the evidence of financial incapacity became starkly clear. Respondent had to borrow about $31,000 in February to meet its upcoming March obligations. Layoffs in that circumstance were not only plausible, but unmistakably necessary. That there was work left to be done is undeniable; equally undeniable is that Respondent had no ability to pay as many workers as it would have needed to if it had kept Hensley and Hunter on. Furthermore, those two were the natural choices. They were deemed the least productive and the most junior.

The General Counsel and the Charging Party make a number of arguments regarding why Respondent's defense should be rejected. The most persuasive is that Respondent gave inconsistent reasons for the layoffs. Second, they argue that Respondent had borrowed enough money to warrant keeping Hensley and Hunter on until the Library actually ended. Third, they see the layoffs as precipitous, occurring within hours of receiving the NMDOL mailed claims.

After carefully considering each of these arguments (as well as some subsidiary observations (i.e., that journeyman Armenta had been sick for several days both before and after the layoffs), I conclude that the arguments are not persuasive in the circumstances.

With respect to the supposed inconsistent, shifting reasons advanced by Respondent, I find them not to be inconsistent at all. Chavey's own explanation to the employees and to any outsider (including the Board investigator) was that there was insufficient work to keep them employed. (To an insider, like Martinez, he hinted it was financial; why else would Martinez have said what he did to Hunter and Pioche?) The supposed inconsistency comes from Respondent's later argument that there was no money with which to pay them. However, what Chavey did here is what small contractors commonly do. They do not want to disclose to employees or to the public that they are facing financial difficulties. They want to keep a brave face on their company's viability. Telling laid off employees they are out of money is a story that would spread like wildfire into their industry. For an ongoing business, such a report would be suicidal. Instead, they invariably choose the vague, neutral euphemism that there is no available work. This accomplishes several things, aside from keeping the cash flow problem close to one's vest. First, the employee suffering this treatment is not told that his work is unacceptable; second, because the lost job is not said to be due to poor performance, it permits the employee the right to claim unemployment benefits; and third, it allows the employee to believe the loss of employment was due to circumstances he could not control, permitting an amicable departure and a hope for a return.

The truth is, where there is insufficient money to pay employees, there literally is no work available for them. For an employer to treat it otherwise would mean it would have to keep people employed on a fraud, because it would be asking them to work knowing it could not pay. So, while there may still be work that needs to be done, it does not follow that there is work available to an employee who cannot be paid. Accordingly, I find Respondent's treatment here to be entirely consistent with what would be expected of an employer facing a cash flow crisis.

Moreover, Respondent has no obligation to go into debt to try to keep persons employed. In a sense, the General Counsel and the Charging Party are arguing that Respondent should have chosen to spend its money in a priority different than it chose. Once Respondent had the loan(s), they say, it should have continued its previous spending patterns

[11] In fact, Hunter's testimony suggests that the reason given was financial, not a lack of work. (*'I don't want you to go, but there's a lot of work that still remains, but Dana told me to let you go, so I'm letting you go.'*) Pioche's recollection is even stronger: ('*. . . I guess Dana does all the figuring and he figured we didn't need any help. . . .*')

that would necessarily have continued Hensley and Hunter's employment. The Board will not substitute its business judgment for that of an employer. It will only assess a Respondent's business decisions to determine if they are discriminatory. *Ryder Distribution Resources*, 311 NLRB 814, 816-817 (1993). [12] Therefore, I do not accept the General Counsel and Charging Party's invitation to determine that Respondent should have decided to continue depleting its money. It was out of ready cash and had to stanch the hemorrhage. Its layoff decision was based on an overwhelmingly significant non-discriminatory factor.

Finally, the decision, as made on the evening of March 5 was precipitous only in the sense that Respondent knew at that moment, that its earlier decision finally had to be implemented. It could not be delayed any further. Plainly, Respondent did not want to lay off anyone. Indeed, the earlier departure of Armon Martinez may have been treated as a blessing in disguise because it probably delayed the layoffs by a few days. The fact that on March 5 Respondent received the mailed version of the wage claims is no factor whatsoever. Both Chaveys had known of the claims for 8 days, having received the February 26 fax from the NMDOL. What is far more important was the loss of the Lydia Rippey School bid on February 25 followed by the loss of the smaller San Juan College job. No new jobs were upcoming and sufficient time had passed without Armon's help that Chavey could confirm that he now needed to struggle on with the remaining work as best he could. He could do that best by laying off his least valuable and least productive employees. Those individuals were Hensley and Hunter. He would have taken this step even if the employees had not engaged in protected conduct.

Accordingly, I conclude, that even if the General Counsel has made out a prima facie case, Respondent has easily rebutted it. The complaint should be dismissed on that basis as well.

Based on the foregoing findings and conclusions, I hereby make the following

Conclusions of Law

1. Respondent is an employer within the meaning of §2(2), (6) and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of §2(5) of the Act.
3. The General Counsel has failed to demonstrate by a preponderance of the evidence that Respondent committed any unfair labor practices alleged.

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[12] In that case, the Board said:

> Although the judge questioned the economic efficacy of the Respondent's decision to contract with TU and found it wanting, "the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change." *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enfg. in part 137 NLRB 306 (1962). Thus, the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated. *Liberty Homes*, 257 NLRB 1411, 1412 (1981). See *Texas Instruments v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979) (the issue is "not to determine how the Board would have behaved under similar circumstances but to determine what in fact motivated the employer'").
>
> Similarly, contrary to the judge, we do not draw a negative inference from the Respondent's failure at trial to present evidence regarding the performance of the contract with TU. The Board does not require an after-the-fact financial evaluation establishing that a business decision proved successful in order to determine whether the decision was lawfully motivated in the first place. See *Robinson Furniture*, 286 NLRB 1076, 1078 (1987). Rather, the Board considers the factors known to the employer at the time the decision was made and decides whether the employer's business strategy was chosen for discriminatory reasons. (footnote omitted.) Id.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [13]

ORDER

The complaint is dismissed in its entirety.

_____
James M. Kennedy
Administrative Law Judge

Dated: January 7, 2004

[13] If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.